Supreme Court, U.S.
FILED

96 508 SEP 26 1996

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

OTIS W. PLASSMAN,
JOYCE A. PLASSMAN,

Petitioner,

vs.

CITY OF WAUSEON, et al.,

Respondents.

APPENDIX ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

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Attorney for
Petitioner.

60 pp

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8. Certificate of Service of Appendix ii

John G. Rust, Counsel for Petitioner hereby certifies that he, on September 26, 1996, served three (3) copies of the foregoing Appendix on City Attorney Jeffrey L. Robinson, P.O. Box 531, Wauseon, Ohio 43567, and Receiver's Attorney Alan J. Lehenbauer, P.O. Box 237, Swanton, Ohio 43558 by U.S. Mail, First Class, Postage Prepaid.

Respectfully submitted,

John G. Rust
Attorney for Petitioner

NO. 95-3736
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OTIS W. PLASSMAN, JOYCE E. PLASSMAN, Plaintiffs-Appellants, v. CITY OF WAUSEON, A Municipal Corporation; PERRY RUPP, Indvidually and as Receiver; TOM HALL, Zoning Inspector; JAMES GAMBER, Fire Chief; JERRY G. MATHENY, Mayor; and CLAIR W. CLARK, President of Council, Defendants-Appellees.	:Filed: May 14, 1996 :ON APPEAL FROM THE UNITED STATES :DISTRICT COURT FOR THE NORTHERN :DISTRICT OF OHIO :NOT RECOMMENDED FOR FULL-TEXT :PUBLICATION :Sixth Circuit Rule 24 limits citation :to specific situations. :Please see Rule 24 before citing in a :proceeding in a court in the Sixth :Circuit. If cited, a copy :must be served on other parties and :the Court. This notice is to :be prominently displayed if this :decision is reproduced.

App. Page 1

BEFORE: MILBURN and BOGGS, Circuit Judges; and BORMAN, *District Judge.

MILBURN, Circuit Judge. Plaintiffs Otis W. Plassman and Joyce A. Plassman appeal the district court's grant of summary judgment in favor of defendants, Receiver Perry Rupp, in his individual and official capacities; City of Wauseon Zoning Inspector Tom Hall; Fire Chief James Gamber; Mayor Jerry G. Matheny; President of Wauseon City Council Clair W. Clark; and the City of Wauseon, Ohio, in this civil rights action brought under 42 U.S.C. §1983. Plaintiffs allege that defendents violated their constitutional rights by destroying their property, which had been declared a nuisance. On appeal, the issues are (1) whether the district court erred in converting defendants' motions to dismiss plaintiffs' amended complaint under Federal Rule of Civil Procedure ("Fed. R. Civ. P.")

*The Honorable Paul D. Borman, United States District Judge for the Eastern District of Michigan, sitting by designation.

12(b)(6) into motions for summary judgment; (2) whether the district court erred in dismissing, on the basis of res judicata, plaintiffs' claim that defendants' destruction of their property violated their due process rights; (3) whether the district court erred in dismissing plaintiffs' claim that defendants violated their First Amendment rights by seeking to enforce a court order in retaliation for the exercise of their right of access to the courts; and (4) whether the district court erred in dismissing plaintiffs' claims against Receiver Rupp. For the Reasons that follow, we affirm.

I.

A.

On April 27, 1992, plaintiffs Otis and Joyce Plassman purchased property in Wauseon, Ohio. The property, commonly known as Kolb Feed Mill, is located 135 Commercial Street in downtown Wauseon. Although defendants

contend that plaintiffs used the property as a "junk yard," plaintiffs assert that they used the property as a "recycling facility." The Plassmans were issued citations for violating the City of Wauseon Zoning Code, the City of Wauseon Maintenance Code, State of Ohio and City of Wauseon Fire Codes, and the State of Ohio Basic Building Code. Plaintiffs were served with notice of these violations by the Ohio Department of Industrial Relations, the City of Wauseon Department of Zoning, Building, and Housing, and the City of Wauseon Fire Chief. Plaintiffs did not effect any form of aministrative appeal with respect to these citations.

On November 18, 1992, the City of Wauseon filed an action in the Court of Common Pleas of Fulton County, Ohio, to have the property declared a nuisance and to enjoin further and continued violations of the various city and

and state codes. The Plassmans filed an answer pro se, and at a pretrial hearing, the court set a hearing date and advised the Plassmans of the necessity of obtaining counsel for that hearing. The Plassmans could not find an attorney to represent them at the hearing, and the court refused to grant a continuance. On March 18, 1993, the court entered judgment in favor of the City of Wauseon. The court found that the Plassmans' use of their property violated city zoning, maintenance, and fire codes and that the condition of the building on the property violated the state building code. The court further determined that because the Plassmans had not effected administrative appeals, they were estopped to deny that the violations existed.

The court's judgment ordered the Plassmans to remove all materials, recyclables, and junk from the property by May 3, 1993, and ordered them to submit to the Wauseon

City law director a contract for either the repair or the demolition of the building on the property by June 1, 1993. The court further held that if the Plassmans failed to comply with its orders by the specified dates, the court would appoint a receiver who would be authorized to take charge of the premises and all personal property. The court's judgment further authorized the receiver to sell all of the personal property on the premises and to obtain a contract to repair or demolish the building.

The Plassmans appealed to the Court of Appeals for Fulton County, Ohio. In their appeal, they requested a stay of the trial court's March 18, 1993 judgment and challenged the court's judgment on various constitutional grounds. The appellate panel held a conference with the Plassmans' attorney at the time, James Hitchcock, and the Wauseon City law director, and the

parties agreed that the stay would be granted provided that the Plassmans removed all of the junk on the property by June 20, 1993. However, the Plassmans did not remove the junk, and the stay was lifted. On February 25, 1994, the court of appeals affirmed the lower court's decision. The Plassmans sought leave to appeal to the Ohio Supreme Court, but the court denied jurisdiction.

On June 20, 1994, defendant Perry Rupp was appointed receiver, at the City's request, to abate the nuisance. Pursuant to the court judgment, Rupp seized all personal property on the premises, including several vehicles. Rupp hired salvage operators who sold the ferrous and non-ferrous materials to various dealers in used metals.

In a letter to the Plassmans' counsel dated July 27, 1994, Jeffrey Robinson, Wauseon City law director, stated that the City would be willing to allow the building on the property to remain standing if the

Plassmans would comply with the directives of the State of Ohio by providing the City with plans for rehabilitation of the building from a certified engineer or architect and proof that a contract with a builder had been entered into that indicated that the building would be rehabilitated within a specified time frame. Robinson stated that if the Plassmans accomplished these things, the City would enter into a joint judgment entry that would stop the receiver from taking any further action.

B.

On July 29, 1994, without taking any steps to accomplish the requirements stated in the letter, the Plassmans filed an action under 42 U.S.C. §1983 in federal court, alleging constitutional violations and seeking a temporary restraining order to prevent Receiver Rupp from demolishing the building on plaintiffs' property. The Plassmans now claim that a city council meeting was held

two days later, on August 1, 1994, at which the City changed its position from being willing to allow the building to stand if the Plassmans abated the nuisance to urging its demolition, as a result of their lawsuit against the City. The district court denied plaintiffs' motion for a temporary restraining order on August 3, 1994.

The Plassmans subsequently filed a motion in the Court of Common Pleas of Fulton County, Ohio, seeking to remove defendant Rupp as receiver and seeking a temporary restraining order to prevent their building's destruction. The court denied the motion on August 10, 1994. On October 17, 1994, the Ohio Court of Appeals held that the lower court's order was not final and dismissed the Plassmans' appeal sua sponte.

On August 17, 1994, the City of Wauseon, Zoning Inspector Tom Hall, Fire Chief James Gamber, Mayor Jerry G. Matheny, and the President of the City Council, Clair W.

Clark (collectively referred to as "the City defendants") filed a motion to dismiss plaintiffs' complaint under Fed. R. CIv. P. 12(b)(6). Defendant Rupp also filed a motion to dismiss on September 30, 1994. On October 20, 1994, plaintiffs filed an amended complaint that added a claim against the City defendants that alleged that their decision to seek the demolition of the building on plaintiffs' property, after the City law director had stated that the City would not do so if plaintiffs complied with the terms of the state court's March 18, 1993 judgment, was motivated by plaintiffs' lawsuit against the City and constituted retaliation in violation of their First Amendment rights. Plaintiffs also sought various injunctions against further actions by defendants with regard to the property.

On February 9, 1995, the City defendants filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss plaintiffs' amended complaint.

Plaintiffs filed notices of depositions on February 17, 1995, and on April 6, 1995. On april 13, 1995, the district court converted defendants' motions to dismiss into motions for summary judgment and granted the motions. The building on plaintiffs' property was subsequently demolished. On April 28, 1995, plaintiffs filed a Fed. R. Civ. P. 59(e) motion to vacate judgment. The district court denied the motion on May 30, 1995, and this timely appeal followed.

II.

A.

Plaintiffs argue that the district court improperly converted defendants' motions to dismiss plaintiffs' amended complaint into motions for summary judgment. Plaintiffs assert that the district court erred by failing to provide plaintiffs with notice of its intention to treat the motions to dismiss as motions for summary judgment. Fed. R. Civ. P. 12(b) requires that "if matters outside

the pleading are presented to and not excluded by the court" in a motion to dismiss under subsection (6), that motion "shall be treated as one for summary judgment." The rule also requires that such a motion be "disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." See United Bhd. of Carpenters & Joiners of Am. v. Ohio Carpenters Health & Welfare Fund, 926 F.2d 550, 558 (6th Cir. 1991)("Where one party is likely to be surprised by the change of proceedings, notice is required.").

In this case, the district court found that plaintiffs had failed to state any claims in their amended complaint upon which relief could be granted. However, because the district court concluded that "all parties [had] refer[ed] to matters outside the pleadings (i.e. transcripts, letters, etc.)," J.A. 306, it held that defendants' motions

to dismiss were actually motions for summary judgment. In their memoranda in support of and in opposition to the motions to dismiss, the parties refer to the proceedings in the state courts regarding this action and to correspondence between the parties regarding the property. Plaintiffs' amended complaint inculdes by reference all of the proceedings and correspondence discussed in the memoranda in support of and in opposition to the motions to dismiss. Moreover, any federal court may take judicial notice of the proceedings in other courts of record. Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th Cir. 1980), cert. denied, 449 U.S. 996 (1980). Therefore, the parties did not refer to matters outside of the pleadings. See Song v. City of Elyria, 985 F.2d 840, 842 (6th Cir. 1993) (holding that because the movants' attachment to their motion to dismiss did not rebut, challenge, or contradict anything in the plaintiffs' complaint, it did

not convert the motion to dismiss into a motion for summary judgment); Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) (holding that documents whose contents are alleged in a complaint and who authenticity is uncontested, but that are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss), cert. denied, 114 S. Ct. 2704 (1994); Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993) (holding that documents attached to defendant's motion to dismiss are considered part of the pleadings if they are referred to in plaintiff's complaint and are central to her claim).

Therefore, because the parties did not present matters outside of the pleadings to the district court and because the district court found that plaintiffs failed to state any claim upon which relief can be granted, we conclude that the district court erred

by treating defendants' motions as motions for summary jdugment. The district court's error is not the sort that warrants remand, however, for we may simply construe its order as a dismissal for failure to state a claim. See. United Bhd. of Carpenters, 926 F.2d at 558 ("As an appellate court, we are not bound to adhere to the label attached to the trial court's disposition of the case.").

B.

Next, plaintiffs argue that the district court erred in dismissing their claim that the City defendants' demolition of their property constituted a violation of their due process rights. We review de novo a district court's dismissal of a suit pursuant to Fed. R. Civ. P. 12(b)(6). Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1109 (6th Cir. 1995), cert. denied, 116 S. Ct. 1041 (1996). On such a motion, "[t]he district court must construe the complaint in the light most favorable to the plaintiff, accept all of

the facutal allegations as true, and determine whether the plaintiff undoubtably can prove no set of facts in support of his claims that would entitle him to relief." Id. In Scheuer v. Rhodes, 416 U.S. 232 (1974), the Supreme Court explained:

> When a federal court reviews the sufficiency of a complaint before the reception of any evidence...its tasks is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

Id. at 236. Thus, a district court may not grant a Rule 12(b)(6) motion merely because it does not believe the factual allegations of the complaint. Allard v. Weitzman (In re De Lorean Motor Co.), 991 F.2d 1236, 1240 (6th Cir. 1993).

Plaintiffs claim that demolition is a remedy of last resort that should be employed only when a building is declared a public nuisance and when destruction of the

property is reasonably necessary to effectuate abatement of the nuisance. In plaintiffs' view, the city attorney's letter providing them an opportunity to repair the building was not necessary. Therefore, they argue that the property's destruction violated due process. The district court held that this claim was fully litigated at the state level, and, therefore, the doctrine of res judicata barred its relitigation.

The rules of res judicata actually comprise two doctrines concerning the preclusive effect of a prior adjudication. The first is claim preclusion, or true res judicata, under which a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 298 (1981). The second doctrine, collateral estoppel or issue preclusion, "precludes relitigation of the same issue on a

different cause of action between the same parties once a court decides an issue of fact or law necessary to its judgment." Duncan v. Peck, 752 F.2d 1135, 1138 (6th Cir. 1985).

In determining the preclusive effect of a prior state court judgment, federal courts must give the same effect to the state court judgment that it would be given under the law of the state in which it was rendered. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984). Ohio courts have consistently recognized and applied the doctrine of claim preclusion not only "to issues that could have been raised by the plaintiff in the prior proceeding but also to issues that could have been raised as defenses to the plaintiff's claim in the earlier case." City of Canton, Ohio v. Maynard, 766 F.2d 236, 238 (6th Cir. 1985) (per curiam)(citing Johnson's Island, Inc. v. Board of Township Trustees, 431 N.E. 2d 672, 674-75 (Ohio 1982)).

In Order for res judicata to apply as a

bar to a second lawsuit, that lawsuit must be between the same parties and involve the same cause of action. Norwood v. McDonald, 52 N.E.2d 67,71 (Ohio 1943). The action in state court was between the City of Wauseon and the Plassmans. In the federal action, the Plassmans listed the names of the City defendants on their complaint, but they failed to specify whether they were suing the city officers in their official or their individual capacities. Where a complaint seeking damages against a city official fails to specify the capacity in which the individual is being sued, we treat the action as one brought against the official's office. See Wells v. Brown, 891 F.2d 591, 592 (6th Cir. 1989). In addition, the Supreme Court has explained that an official capacity lawsuit should be treated as a suit against the government entity of which the officer is an agent. Kentucky v. Graham, 473 U.S. 159, 165-66 (1985). Therefore, we conclude that there is an identity

of parties with the prior state court proceeding. Thus, the only relevant question is whether the present claim involves the same cause of action as the earlier state case.

Under Ohio law, the proper way to determine whether two causes of action are the same is "to consider the facts necessary to sustain the claim." Duncan v. Peck, 752 F.2d at 1139. Applying this standard, we conclude that the cause of action in this case is the same as in the prior state court judgment. In both cases, at issue was the determination that the destruction of plaintiffs' property was a proper means to abate the nuisance. (Underscoring Counsel's).

Out determination is supported by City of Cincinnati ex rel. Crotty v. City of Cincinnati, 361 N.W.2d 1340 (Ohio 1977). In that case, citizens of Cincinnati sued the city, alleging that enforcement of the state fluoridation laws violated the First Amendment and the Equal Protection Clause. The Ohio

Supreme Court held that the suit was barred under res judicata because the constitutional issues could have been raised as defenses in an earlier state court proceeding involving the enforcement of the fluoridation laws against Cincinnati. Similarly, in this case, the due process argument offered by plaintiffs is nothing more than a defense to the City's action for abatement and could have been raised in state court. Thus, we conclude that the district court in this case properly dismissed plaintiffs' due process claim.

C.

Plaintiffs also argue that the district court erred in dismissing their claim that the City defendants violated their First Amendment rights by revoking their offer to allow plaintiffs an opportunity to repair the building on their property and instead seeking its destruction in retaliation after plaintiffs filed this action against the City defendants. It is well established that retaliation by a public official for the exercise of a

constitutional right is actionable under 42 U.S.C. § 1983, even if the act, when taken for different reasons, would have been proper. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84 (1977); Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953, 959 (6th Cir. 1986); Smith v. Maschner, 899 F.2d 940, 948 (10th Cir. 1990). One of the purposes of this rule is to prevent state officials from exercising their discretionary authority for retaliatory purposes.

In this case, the state court authorized the City to demolish the building on plaintiffs' property before plaintiffs filed their lawsuit against the City defendants. Thus, the City defendants did not exercise discretion in determining that the destruction of the building was an appropriate remedy to abate the nuisance. Therefore, their taking steps to enforce the court's judgment is not the type of retaliatory conduct that the rule stated above is intented to protect against.

Accordingly, we hold that the district court did not err in finding that plaintiffs failed to state a claim upon which relief could be granted as to this issue.

D.

Next, plaintiffs argue that the district court erred in dismissing their claim against Receiver Rupp on the bais of res judicata. In that action, plaintiffs sought a temporary restraining order and to have a new receiver appointed, and the state court held that defendant Rupp's conduct had been reasonable and had not damaged plaintiffs. However, in order for res judicata to apply, there must have been a final judgment on the merits. Johnson's Island, Inc., 431 N.E.2d at 674. The Ohio Court of Appeals had that the lower court's order denying the Plassmans' motion to remove the receiver was not a final reasonable order, and therefore, the district court's application of res judicata was erroneous.

Defendant Rupp argues that we should uphold the district court's dismissal of plaintiffs' claims against him nonetheless because, he asserts, he is entitled to judicial immunity for his actions identified in plaintiffs' complaint. In Bush v. Rauch, 38 F.3d 842 (6th Cir. 1994), we noted that "absolute judicial immunity has been extended to non-judicial officers who perform 'quasi-judicial' duties." Id. at 847. We explained that "[q]uasi-judicial immunity extends to those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune." Id. To determine whether an officer is entitled to judicial immunity, we apply a "functional" approach pursuant to which a court "looks to 'the nature of the function performed, not the identity of the actor who performed it.'" Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2613 (1993) (quoting Forrester v. White, 484 U.S.

219, 229 (1988)).

In Bush, we held that a court administrator acted as an arm of the court by carrying out the orders of a referee and was thereby entitled to judicial immunity. We held, "[a]s other circuits have held, [that] enforcing or executing a court order is intrinsically associated with a judicial proceeding." Id., 38 F.3d at 847. In support of this holding, we explained:

> [O]fficials must be permitted to rely upon a judge's findings and determinations to preserve the integrity of the court's authority and ability to function. It does not seem logical to grant immunity to a judge in making a judicial determination and then hold the official enforcing or relying on that determination liable for failing to question the judge's findings. This would result inthe official second-quessing the judge who is primarily responsible for interpreting and applying the law.

Id. at 848. In Smith v. Martin, 542 F.2d 688, 690 (6th Cir. 1976)(per curiam), cert. denied, 431 U.S. 905 (1977), we held that a court appointed receiver who did not act

outside of his authority under court order or maliciously or corruptly was entitled to judicial immunity. Other circuits have also held that a receiver is entitled to judicial immunity if the challenged actions are taken in good faith and are within the scope of the authority granted to the receiver. See Davis v. Bayless, 70 F.3d 367, 373 (5th Cir. 1995); New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1304 (9th Cir. 1989); Property Management & Invs., Inc. v. Lewis, 752 F.2d 599, 603-04 (11th Cir. 1985); Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno, 547 F.2d 1,3 (1st Cir. 1976); Bradford Audio Corp. v. Pious, 392 F.2d 67, 72-73 (2d Cir. 1968).

In their complaint, plaintiffs allege that defendant Rupp was negligent in seizing certain vehicles and other items on their property that plaintiffs could have removed, and in failing to minimize plaintiffs' losses when he sold plaintiffs' personal property and contracted to have the building on their

property demolished. Plaintiffs allege that defendant Rupp did not protect their best interests because he had a contract with the City to remodel the City administration building.

We conclude that plaintiffs have failed to allege that defendant Rupp exceeded the scope of the authority granted him by the state court. In its March 18, 1993 judgment, the court authorized the receiver to sell all of the personal property on the premises and to obtain a contract for the repair or destruction of the building. Thus, the receiver's actions did not exceed the scope of the authority granted him by court order, and he is entitled to judicial immunity for executing the court's order. Accordingly, we uphold the district court's dismissal of plaintiffs' claims against defendant Rupp, albeit for reasons different from those relied on by the district court. See Foster v. Kassulke, 898 F.2d 1144, 1146 (6th Cir. 1990).

III.

For the reaons stated, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Otis W. Plassman, et al,

Defendants

v.

City of Wauseon, et al.,

Defendants

Filed:
August 1, 1994

3:94CV7407

Order

Pending in this case, which was filed on July 29, 1994, is a motion for a temporary restraining order. The Judge to whom this docket is assigned for supervision is not available, and will not be available for at least ten days. This matter had, accordingly, been referred to me for initial review and determination.

I have examined the motion, complaint, and supporting documents. I do not find the motion to be well taken.

The events leading to this lawsuit have been protracted. It does not appear that plaintiffs have acted with due diligence, and that they are seeking at the last minute to

obtain an order from this court to prevent the completion of state judicial and related proceedings.

I cannot find that there is a substantial likelihood that plaintiffs will prevail on the merits. I conclude, in any event, that the harm that they may incur is not reparable. If their property has been and will be taken wrongfully, they can be compensated adequately with an award of damages.

In light of the foregoing, it is

ORDERED THAT the motion for temporary restraining order be, and the same hereby is denied.

So ordered.

James G. Carr
United States
District Judge

IN THE UNTIED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

OTIS W. PLASSMAN,et al.,

Plaintiffs,

-vs-

CITY OF WAUSEON,et al.,

Defendants.

Filed: April 13, 1995

Case No. 3.94CV7407

JUDGMENT ENTRY

KATZ, J.

For the reaons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that summary judgment is granted to all Defendants.

FURTHER ORDERED that the motion for sanctions is denied.

FURTHER ORDERED that Plaintiffs' motions for preliminary and permanent injunction and temporary restraining order are denied.

DAVID A. KATZ
UNITED STAES DISTRICT
JUDGE

IN THE UNITED STAES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

OTIS W. PLASSMAN, et al., Filed: April 13, 1995

Plaintiffs, Case No. 3:94CV7407

-vs- MEMORANDUM OPINION

CITY OF WAUSEON, et al.,

Defendants.

KATZ, J.

This case is before the Court on several motions. Defendants have moved to dismiss Plaintiffs' complaint, and then, following the filing of an amended complaint, moved to dismiss the amended complaint. Accordingly, the initial motion to dismiss (Doc. No. 12) will be overruled as moot, and the motion to dismiss the amended complaint (Doc. No. 36) will be ruled upon as discussed below. As the amended complaint did not state any additional causes of action against Defendant Rupp, his motion to dismiss remains at issue, and will be ruled upon herein. Additionally, this Court will proceed to rule upon the Defendants' motion for sanctions (Doc. NO. 31).

I. Statement of Facts

This case concerns a piece of property located in Wauseon, Ohio. Plaintiffs' purchased this property, commonly known as Kolb Feed Mill and located on Commercial Street in downtown Wauseon, on April 27, 1992. The parties differ in their characterizations of the Plaintiffs' use of this property; the Defendants maintain that the Plaintiffs began to use the property as a "junk yard," while the Plaintiffs characterize their use of the property as a "recycling facility."

Pursuant to the rules and regulations of the State of Ohio, Department of Industrial Relations, when a change of use in a commercial or industrial structure takes place, the building must be reinspected to determine whether or not it meets the provisions of the Ohio Basic Building Code. Elmer Waltz, Chief Inspector of that division, inspected the property and found that it was not in compliance.

In response to complaints from area residents, Tom Hall, Code Administrator for the City of Wauseon and a defendant in this action, inspected the property and cited the Plassmans for violations of the zoning and maintenance codes of the City of Wauseon. Additionally, James Gamber, the Fire Chief and a defendant herein, found that the storage of various materials adjacent to and inside the premises constituted a fire hazard and issued a citation for corrections. An individual who is cited with code violations may affect an administrative appeal to various administrative boards in the event a property owner disagrees with the findings of the Code Administrator, Fire Chief or Inspector. The Plassmans did not appeal.

The City filed suit to enjoin further and continued violations of the various City and State codes. The Plassmans filed an answer pro se. Judge Schmenk held a pretrial at which he set a hearing date and advised

the Plassmans of the necessity of obtaining counsel for that hearing. Days before the hearing and after various subpoenas had been issued to other individuals, Mr. Plassman lamented that he had not been able to secure counsel and that he could find no one to take his case. The Plassmans state, in their Complaint, that they initially believed that Attorney Wayne Schaeffer would represent them, but this turned out not to be the case. When Schaeffer's representation fell through, the Plassmans were unable to find another attorney to take their case before the hearing date. Judge Schmenk refused to grant a continuance.

Judge Schmenk held a hearing on March 3, 1993. He ultimately found that it was apparent that the use of the property was in violation of the City zoning, maintenance and fire codes and that the building's condition violated the State building code. The Court further determined that as the Plassmans had not effected administrative appeals, they were estopped to deny that the violations

existed. The Court then provided a remedy for abatement and a time frame in which the abatement was to take place. The order provided that the Plassmans could avoid the abatement order by taking certain actions on their own. The Plassmans did not do so.

The Plassmans appealed to the Court of Appeals for Fulton County, claiming various constitutional violations, and then requested a stay of the lower court's order. The City opposed a stay, and a conference was held between the Plassman's attorney at the time, James Hitchcock, the Wauseon City Law Director, and the three-judge panel who had been selected to hear the appeal. It was agreed that the stay would be granted provided the Plassmans had all of the junk removed from the exterior of the property by a specific date in June. The junk was not removed and the stay was lifted.

The Court of Appeals affirmed Judge Schmenk's decision. The Plassman's then

attempted to appeal to the Ohio Supreme Court, but the Ohio Supreme Court denied jurisdiction.

The City then requested that a receiver be appointed. Defendant Perry Rupp was appointed receiver to abate the nuisance. Rupp hired salvage operators who removed the ferris and non-ferris materials to various dealers in used metals. Rupp also seized all personal property on the premises pursuant to a Court order, including several vehicles.

There is some confusion as to events that occurred at the time the instant suit was filed on July 29, 1994. On July 27, 1994, Jeffrey Robinson, the attorney for the City, wrote to the Plassmans' counsel, stating that the City was, as it alsways had been, willing to let the building stand if the Plassmans would comply with the directives of the State of Ohio by providing the City with plans for the rehabilitation of the building from a certified engineer or architect and proof that a contract with a builder had been entered into which included a specified date

indicating that the building would be rehabilitated within a specified time frame. (Attachment E to Plassmans' Amended Complaint.) Robinson stated that, if the Plassmans accomplished these things, the City would enter into a joint judgment entry which would alleviate the receiver from taking any further action.

On July 29, 1994, without having accomplished any of the steps outlined in Robinson's letter, the Plassmans filed the instant suit naming as defendants the City of Wauseon, Zoning Inspector Tom Hall, Fire Chief James Gamber, Wauseon Mayor Jerry Matheny, Wauseon City Council President Clair Clark (collectively referred to as the "City Defendants") and Perry Rupp. Tne Plassmans asserted numerous constitutional violations. Thereafter, the Plassmans claim that on or before an August 3, 1994 meeting of the Wauseon City Council, the City altered its position from being willing to allow the building to stand to urging its demolition. The Plassmans then

amended their complaint to claim that the City's change in position constitutes relatiation in violation of their First Amendment rights.

II. Standard of Review

The City Defendants have filed a motion to dismiss the amended complaint, and Perry Rupp has filed a motin to dismiss. However, because all parties refer to matters outside the pleadings (i.e.transcripts, letters, etc.), this Court will treat such motions as motions for summary judgment. Such treatment is permitted by Fed. R. Civ. P. 12, which states:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element

essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Of course, the moving part always bears the initial responsibility of informing th district court of the basis for its motin, and identifying thos portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, "which it believes demonstrate the absence of a genuine issue of material fact. 477 U.S. at 322. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely its previous allegations. It is not sufficient to "simply show that there is smoe metaphysical

doubt as to the material facts. "Matsushita Elec. Indus. CO. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and presnet some type of evidentiary material in support of its position. Celotex Corp., 477 U.S. at 324. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(e).

III. The City Defendants' Motion to Dismiss Amended Complaint

In their motion to dismiss, the City defendants argue that the many constitutional claims made by the Plassmans either were or could have been brought in the state court action. Because the Plassmans either lost or did not assert the causes of action they

now claim, their action is barred by collateral estoppel and res judicata.

The doctrine of res judicata states that a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Under the doctrine of collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Montana v. United States, 440 U.S. 147, 153 (1979).

The Plassmans contend that to apply the doctrines of res judicata and collateral estoppel in the instant case would constitute manifest injustice because they were not represented by counsel during the initial stages of the state court litigation. The Plassmans argue that the court should, in its

discretion, refuse to apply res judicata and collateral estoppel.

This Court agrees with the City defendants. The Plassmans' constitutional claims, save the claim for retaliation in violation of the Plassmans' First Amendment rights (which will be separately addressed below), were fully litigated at the state court level. That the Plassmans were not represented initially does not, in this Court's mind, constitute manifest injustice. The Plassmans were warned at a pretrial that the trial would go forward whether they were represented or not. There is no manifest injustice; the Plassmans had their "day in court".[1]

With respect to the Plassmans' argument that their First Amendment rights were violated by the City's change in position from allowing the Plassman's to rehabilitate the property to urging its demolition, this Court

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[1]Additionally, the Court notes that the Plassmans were represented on appeal, but apparently did not plead the lack of counsel argument on appeal.

finds such a novel proposition unsupported in law or in fact. The limited case law cited by the Plassmans in inapposite to the claim they are attempting to state. The City made an offer of settlement to the Plassmans. The Plassmans neither accepted nor rejected the offer. There was no reason the City could not change its position. The Plassmans' First amendment rights were not violated by the City's actions.

Summary judgment will be granted to the City Defendants.

IV. Perry Rupp's Motion to Dismiss

The Court first notes that the Plassmans' amended complaint does not state any additional allegations against Receiver Perry Rupp. Therefore, this Court will proceed to rule upon Rupp's motion to dismiss that was filed prior to the filing of the amended complaint.

In a Judgment Entry filed on August 10, 1994, the Fulton County Common Pleas Court, through Judge Schmenk, found, in relevent part:

2. That Mr. Plassman's testimony about the value of the materials is not credible;
3. that the conduct of the receiver (Perry Rupp) has been imminently reasonable;
4. That the receiver has been following and abiding by the Order of the Court;
5. That the receiver has been proceeding in a cost effective manner, not only attempting to accomplish the command of the Court Order but also that the receiver has exercised due care to protect the interests of the defendandts, Otis and Joyce Plassman (i.e. the plaintiffs here within);

***

19. That the [Plassmans] do not appear to have been damaged by any action of the receiver.

(Appendix 1 to City's Motion to Dismiss.)

Rupp claims that, given this decision by the Common PLeas Court, the doctrine of res judicata prohibits this Court from addressing the propriety of his actions as receiver. This Court agrees. The Plassmans have challenged the propriety of Rupp's actions in state court, and are bound by the state court's decision. Therefore, Rupp's motion to dismiss will be granted.

V. Motion for Sanctions

The City Defendants also move for sanctions against the Plassmans and/or their counsel. It is within the discretion of the Court ot grant or withhold sanctions, and this Court chooses in the instant case to deny imposition of sanctions.

VI. Conclusion

For the reasons set forth herein, this Court will grant summary judgment to the City Defendants' on teh amended complaint. Additionally, Perry Rupp's motion to dismiss will be granted. Of necessity, therefore, the Plassmans' motions for premliminary injunction, permanent injunction, and temporary restraining order are all denied. The City Defendants' motion for sanctions is denied.

IS IS SO ORDERED.

David A. Katz
United Staes
District Judge

No. 95-3736

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OTIS W. PLASSMAN, ET AL.,
Plaintiffs-Appellants,

-vs-

CITY OF WAUSEON, ET AL.,
Defendants-Appellees.

FILED June 28, 1996

Leonard Green, Clerk

ORDER

BEFORE: MILBURN and BOGGS, Circuit Judges; and BORMAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition

*Hon. Paul D. Borman, United States District Judge for the Eastern District of Michigan, sitting by designation.

is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

IN THE COURT OF COMMON PLEAS OF
FULTON COUNTY, OHIO

CITY OF WAUSEON : Filed March 18, 1993.

Plaintiff, : CASE NO. 92CV000270

v. : JUDGMENT ENTRY

OTIS PLASSMAN, Et AL:

Defendants. :

This cause came on to be heard on the 2nd day of March, 1993, before the Honorable Joseph Schmenk sitting by assignment in the Court of Common Pleas of Fulton County, Ohio. Present in the Courtroom was the City of Wauseon by its Mayor, Jerry G. Matheny, and City Law Director, Jeffrey L. Robinson. Also present in the Courtroom was the Defendant Otis Plassman, pro se. Defendant Joyce Plassman, wife of the Defendant Otis Plassman, was not present nor represented by counsel at the hearing.

The Court received evidence based on the Complaint filed by the Plaintiff and the Answer filed by the Defendants and also heard argument of counsel as well as reviewing all pre-trial briefs in the subject cause.

The Court being duly advised about the premises finds that the Plaintiff has established by clear and convincing evidence the following facts:

1. That the City of Wauseon is a chartered municipal corporation properly organized under the laws of the State of Ohio.

2. That Defendants Otis and Joyce Plassman are the owners of certain real property located within the City of Wauseon at 135 Commercial Street and at 837 Third Street.

3. That the Defendants are currently operating recycling or junk business at the property located at 135 Commercial Street and at the property located at 837 Third Street.

4. That said recycling or junk operation constitutes a violation of the City of Wauseon Zoning Code with respect to the property located at 135 Commercial Street and at 837 Third Street.

5. That the Defendants are in violation of the City of Wauseon Maintenance Code with respect to the levels of maintenance on the building or structure located at 135 Commerical Street.

6. That the Defendants are in violation of State and City Fire Codes with respect to the property located at 135 Commercial Street.

7. That the Defendants are in violation of the State of Ohio Building Code with respect to the property at 135 Commercial Street.

8. That the Defendant Otis Plassman was served with notices of violations from the Ohio Department of Industrial Relations, the City of Wauseon Department of Zoning and Housing and the City of Wauseon Fire Chief.

9. That the Defendants did not effect any form of administrative appeal with respect to those notices.

10. That the Defendants are estopped to

raise any defenses with respect to the alleged violations of the Fire, Maintenance and Zoning Codes of the City of Wauseon and the Ohio Basic Building Code because they failed to effect an appeal.

11. That the continued operation of a recycling or junk business at the property at 135 Commercial Street constitutes a public nuisance.

12. That the failure to properly maintain and/or correct deficiencies in the structure at 135 Commercial Street constitutes a public nuisance.

13. That the City of Wauseon is entitled to a permanent injunction barring Defendants from operating a recycling or junk business at 135 Commercial Street and that the City is further entitled to equitable relief requiring the Defendants to comply with the City Fire Code, Zoning Code, Maintenance Code and the State Building Code.

14. That the City is entitled to further equitable relief to abate the public nuisance

as set forth in the order hereinafter.

15. That with respect to the property at 837 Third Street, the Court finds that the Defendants have failed to establish the existence of a prior nonconforming use.

16. That to the extent evidence was received regarding a prior nonconforming use, that the character of that use has changed and that the use is much more expansive and is of a different degree than that which may previously have existed.

17. That the Defendants' operation of a recycling business and failure to properly maintain the property constitutes a public nuisance and that the City of Wauseon is entitled to a permanent injunction enjoining and restraining the Defendants from continuing in their improper use of the Third Strret property.

18. That the City of Wauseon is entitled to further equitable relief to abate the public nuisance as set forth in the order of the Court hereinafter.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That with respect to the property at 135 Commercial Street, on or before May 3, 1993, the Defendants shall have removed all materials, recyclables and junk from said property.

2. That on or before June 1, 1993, the Defendants shall present to the City Law Director, a bona fide contract for the repair or demolition of the structure located on the property located at 135 Commercial Street.

3. That in the event the materials, recyclables and junk are not removed within 60 days and/or a bona fide contract for repair or demolition is not provided as set forth hereinbefore, then the Court shall appoint a receiver to take charge of the premises and all personal property located thereon at the Defendants' expense. The receiver shall have the authority to sell all personal property, recyclables, junk or other materials on the property and to apply

the proceeds to the repair or demolition of the building aforesaid. In the event the proceeds from the sale of the personal property, recyclables, junk or other materials are insufficient to pay the costs of the repair or demolition of the building, the real property shall be sold in a commercially reasonable manner and the net proceeds shall be used to pay the costs of abatement of the nuisance. In the event the proceeds exceed the costs of abatement, said proceeds shall be refunded to the Defendant equally.

4. That with respect to the property located at 837 Third Street, on or before July 5, 1993, the Defendants shall abate the nuisance thereon and come in compliance with all City Building, Zoning, Maintenance and Fire Codes and Regulations.

5. That in the event the Defendants fail to bring the property in compliance as required hereinabove, that a receiver shall be appointed to bring the property into compliance at the

Defendants' costs. In the event the Defendants shall fail to pay the costs to abate the nuisance, any personal property located on the described premises shall be sold and the proceeds applied to abate the nuisance. In the event the proceeds from the sale of the personal property shall be used to pay for the abatement of the public nuisance. In the event the net proceeds exceed the costs of abating the nuisance, the net proceeds shall be paid to the Defendants.

6. That if the Defendants fail to meet any of the time deadlines as set forth hereinabove, that the Plaintiff may file notice thereof with the Court and that the Court shall appoint the receiver without further notice and without hearing.

7. That the Defendants are to pay the costs of the subject action.

_____
Judge

APPROVED:

_____
Jeffrey L. Robinson
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Otis W. Plassman,	: Case No.: 3:94CV7407
and	: Judge Code - 4725
Joyce A. Plassman,	: Filed July 29, 1994
Plaintiffs,	: AFFIDAVIT OF PLAINTIFF OTIS W. PLASSMAN
vs.	: IN SUPPORT OF MOTION FOR TEMPORARY
City of Wauseon, a Municipal Corporation, et al.,	: RESTRAINING ORDER.
	: John G. Rust (0000098-O.S.Ct.#)
Defendants.	: 4628 Lewis Avenue Toledo, Ohio 43612
	: (419) 476-0347
	: Attorney for Plaintiffs.

STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

Otis W. Plassman, being first duly sworn, deposes and states that he is a Plaintiff herein, and the husband of Plaintiff Joyce A. Plassman; that he has read the Complaint herein, and also of Attorney Rust's Affidavit herein; and that the statements of fact therein are of his personal knowledge, experience, and belief; true to the best of his recollec-

tion; and that the statements of opinion therein are well taken, issued in good faith, believed to be valid and reliable, based on his experience of 35 years in the recycling business, worked in commercial construction as a worker in various trades, has built in 1974 his brick veneered home, 835 Third Street, Wauseon, Ohio; and in demolition has torn down garages and barns.

Otis W. Plassman

Sworn to before me and subscribed in my presence this July 29, 1994.

Notary Public

CERTIFICATE OF SERVICE

A copy of the foregoing will be delivered to Wauseon Law Director Jeffrey L. Robinson or his office, at 124 N. Fulton Street, Wauseon, Ohio this 29th day of July, 1994.

John G. Rust
Plaintiffs' Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Otis W. Plassman,	:	Case No.: 3:94CV7407
and	:	Judge Code - 4725
Joyce A. Plassman,	:	Filed July 29, 1994
Plaintiffs,	:	AFFIDAVIT OF PLAINTIFFS' ATTORNEY
vs.	:	JOHN G. RUST IN SUPPORT OF MOTION
City of Wauseon, a Municipal Corporation, et al.,	:	FOR TEMPORARY RESTRAINING ORDER.
Defendants.	:	John G. Rust (0000098-O.S.Ct.#) 4628 Lewis Avenue Toledo, Ohio 43612 (419) 476-0347
	:	Attorney for Plaintiffs.

STATE OF OHIO)
) SS:
COUNTY OF LUCAS)

John G. Rust, being first duly sworn, deposes and states that he read the Complaint herein, and that the statements of fact as to are true to the best of his recollection; and that the statements opinion as to the Law and practice, are true to the best of his knowledge and belief; and that all the

statements and allegations in the Complaint are in compliance with Rule 11.

Further, as to the issue of Notice on the Temporary Restraining Order, Wauseon Law Director Jeffrey L. Robinson has told this counsel that he is available on the Hearing on the Temporary Restraining Order on Friday afternoon July 29, 1994, or Monday afternoon, August 1, 1994.

Since writing the above, this counsel has received a letter from Attorney Robinson, which narrows the issues, and is attached as Ex. "C", but does not do away with the dire and critical need for a Temporary Restraining Order.

Mr. and Mrs. Plassman do not have the money to hire a builder to do the work, but Mr. Plassman is competent to do the work under plans certified by an engineer, which will make the Feed Mill Building, safe and free from harm to others. The facts stand out that the building has stood for over 100 years, and Mr. Plassman will do what is

necessary to make it free from public nuisance, structurally sound, and free from any dangers to others.

The Receiver plans now, as he told this counsel yesterday, on the 28th, to demolish the Feed Mill Building just as soon as a contract can be let, and expects to demolish on Wednesday or Thursday next.

Attorney Robinson does not purport to represent the Receiver, Mr. Perry Rupp, and this counsel was referred to Receiver Rupp when asked when the demolition would start; and to secure that information, this counsel called Wauseon Code Administrator Tom Hall, near whose office Mr. Rupp was working reportedly on a City let job, and this counsel left work with Mr. Hall to have Receiver Rupp call me, and the Receiver did. Mr. Rupp admittedly is a hard man to contact. This counsel doesn't remember that Mr. Hall was asked, nor said anything, except he would leave word for Mr. Rupp, and didn't know

of Receiver Rupp's plans for the demolition.

Plaintiffs need a Temporary Restraining Order also so that Plaintiffs may salvage as much as possible fromt he various personal property items left in the Feed Mill Building, as otherwise the Receiver will sell them for five cents on the dollar, of their worth, as Mr. Plassman believes and fears.

_____
John G. Rust

Sworn to before me and subscribed in my presence this July 29, 1994.

_____
Notary Public

CERTIFICATE OF SERVICE

A copy of the foregoing will be delivered to Wauseon Law Director Jeffery L. Robinson or his office, at 124 N. Fulton Street, Wauseon, Ohio this 29th day of July, 1994.

_____
John G. Rust
Plaintiffs' Attorney

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July 27, 1994

John G. Rust
4628 Lewis
Toledo, OH 43612-2395

RE: City of Wauseon vs. Otis Plassman

Dear Mr. Rust,

It was a pleasure speaking to you last week regarding this matter. I have indicated previously to Mr. Plassman's other attorney that the City is not "in charge" of this particular project. Rather, the project is being conducted by the receiver whose name is Perry Rupp.

The City would be more than happy to allow the building to remain standing provided that Mr. Plassman comply with the directives of the State of Ohio, Department of Industrial Relations. That is to say that Mr. Plassman needs to provide us with plans for the rehabilitation of the building from a certified architect or engineer and proof that a contract has been entered into with a builder with a specified time date indicating that

the building will be rehabilitated within a specified time frame.

This is all we have asked from Mr. Plassman from the beginning. If Mr. Plassman is willing to do these things, we could be more than happy to enter into a joint judgment entry which would alleviate the receiver from taking any further action-vis a vis - the Commercial Street property.

I would like to remind you, however, that I do represent the City of Wauseon. As the attorney for the City, I expect that any requests of any City officials will come through my office. Mr Hall has indicated he has received at least one phone call from you. I consider Mr. Hall to be my "client" or an "employee of my client" and further would anticipate that you would extend the courtesy of allowing me to make arrangements to obtain any information that you desire.

I look forward to working with you on this matter.

Sincerely yours,

BARBER, KAPER, STAMM & ROBINSON

Jeffrey L.Robinson

JLR/vlr

Respectfully submitted,

John G. Rust

John G. Rust
Attorney for Petitioner's

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